

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0832, State of New Hampshire v. Otniel Lopez, the court on October 31, 2007, issued the following order:

The defendant, Otniel Lopez, appeals his conviction for aggravated felonious sexual assault. He contests the sufficiency of the evidence and argues that the trial court erred in failing to sequester the victim's mother and in refusing to allow him to recall her during his case. We affirm.

To prevail in a challenge to the sufficiency of the evidence, the defendant bears the burden of proving that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. See State v. Crie, 154 N.H. 403, 406 (2006); see also State v. Pittera, 139 N.H. 257, 260 (1994) (when sufficiency of evidence at close of State's case and close of trial is contested on appeal, test is same). In reviewing the evidence, we examine each evidentiary item in the context of all the evidence, not in isolation. See Crie, 154 N.H. at 406. Further, the trier may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom. *Id.*

The evidence in this case included the young victim's testimony that the defendant was lying in bed in his pajamas under covers up to his stomach and asked her to lick something on top of him "[l]ike right, like where his stomach was" and that white stuff came out after she did. When asked to describe the size of the object, the victim used her hands to indicate the width and height, which the prosecutor later described during argument on the defendant's motion to dismiss as consistent with the size of "sexually aroused male genitalia." The defendant's conduct, including his lack of concern about the victim following disclosure and his inability to provide an explanation for the conduct both upon disclosure and later at trial, also demonstrated consciousness of guilt. The victim's conduct, including her hesitancy to disclose and her subsequent lack of interest in seeing the defendant again, was also consistent with her report but did not support an innocent explanation. We therefore conclude that there was sufficient evidence for the jury to find beyond a reasonable doubt that the defendant committed aggravated felonious sexual assault. See RSA 632-A:2, I (defining aggravated felonious sexual assault); RSA 632-A:1, V (defining sexual

penetration); State v. Cobb, 143 N.H. 638, 658 (1999) (proper analysis is not whether every possible conclusion has been excluded, but, rather, whether other rational conclusions based upon the evidence have been excluded).

The defendant also argues that the trial court erred in denying his request to sequester the victim's mother. The record indicates that the trial court concluded that because the mother would testify as the first witness, the request was essentially moot. Although defense counsel suggested that he might want to recall her during his case, the trial court advised that it would strictly enforce Superior Court Rule 69. Defense counsel's only other proffer was that the mother's testimony might be necessary to address inconsistencies; the trial court agreed to consider that issue if it arose and noted that would not be affected by sequestration, to which defense counsel replied, "OK." In this case, where the mother testified first and the defendant never sought to recall her, he has not established that any prejudice was caused by the denial of his motion to sequester. See State v. Lambert, 147 N.H. 295, 296 (2001) (to establish unsustainable exercise of discretion defendant must demonstrate that trial court's ruling was clearly untenable or unreasonable to the prejudice of his case).

To the extent that the defendant attempts to contest the admissibility of portions of the mother's testimony, he has failed to cite any portion of the record where he specifically objected to the testimony. Accordingly, we do not consider this issue. See State v. Blackmer, 149 N.H. 47, 48 (2003) (specific and contemporaneous objection must be made in trial court to preserve issue for appellate review).

The defendant also contends that the prosecutor's opening statement was improper; he concedes, however, that he did not object at trial. While he argues that the trial court should have sua sponte admonished the prosecutor for allegedly vouching for the credibility of the State's witnesses, he cites no authority for this proposition, and we decline to adopt it.

Affirmed.

DUGGAN, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**